

SERVICE DATE – FEBRUARY 22, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35583

EASTERN ALABAMA RAILWAY LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision denies an appeal by Eastern Alabama Railway LLC of the procedural schedule established for this proceeding.

Decided: February 21, 2012

On January 27, 2012, the Board instituted a proceeding to resolve a controversy between Eastern Alabama Railway LLC (EARLY) and the Utilities Board of the City of Sylacauga, Ala., (Utilities Board) regarding the proposed condemnation of certain EARLY property by the Utilities Board to permit the construction of an underground sewer line. In that decision, the Board also adopted an expedited procedural schedule. EARLY has now filed an appeal of the procedural schedule adopted in that decision. We are denying the appeal.

BACKGROUND

On August 23, 2011, the Utilities Board filed a complaint for condemnation in the Probate Court of Talladega County, Ala., seeking to condemn an easement across EARLY's property for subterranean water and sewer pipes.² On September 2, 2011, EARLY filed a notice of removal to the United States District Court for the Northern District of Alabama, and subsequently, on November 15, 2011, it filed a motion to refer that case to the Board.³ This matter was referred to the Board by the court on November 17, 2011. Utils. Bd. of City of Sylacauga v. E. Ala. Ry., No. 1:11-CV-03192 (N.D. Ala. Nov. 17, 2011).

On December 16, 2011, EARLY filed a petition for declaratory order, asking the Board to institute a proceeding. EARLY believes that the proposed condemnation is preempted by federal law pursuant to 49 U.S.C. § 10501(b). On January 19, 2012, the Utilities Board filed a reply, in which it argued that the condemnation of an easement for the underground sewer line is not preempted, and requested that the Board issue a decision to that effect. Moreover, the Utilities

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Pet. at 17.

³ Pet. at 25-33, 46-48.

Board requested that the Board take expedited action and issue a decision by February 29, 2012, due to the impending startup of operations at a new manufacturing facility in Sylacauga. According to the Utilities Board, the new facility has requested sewer service to start by April 1, 2012.

By decision served on January 27, 2012, the Board, through the Acting Director of the Office of Proceedings, instituted a proceeding to resolve the controversy at issue and adopted an expedited procedural schedule. Pursuant to that schedule, EARY's opening statement was due February 8, 2012, the Utilities Board's reply statement was due February 15, 2012, and EARY's rebuttal statement was due February 21, 2012.

EARY has now filed an appeal of that decision pursuant to 49 C.F.R. § 1011.6(b), arguing that the Board's setting of an expedited schedule with no provision for discovery was a clear error of judgment and will create manifest injustice. On February 7, 2012, the Utilities Board submitted a letter in response to EARY's appeal, to which EARY replied by letter that same day. On February 13, 2012, the Utilities Board filed a comprehensive reply in response to the appeal.

Because "the filing of motions or other pleadings [does] not automatically stay or delay the established procedural schedule," 49 C.F.R. § 1112.2, however, EARY submitted its opening statement to the Board on February 9, 2012, in conformity with the procedural schedule. On February 13, 2012, the Utilities Board submitted its reply. In its filings in this proceeding, the Utilities Board provides much information of the type requested by EARY and, as such, argues that discovery is neither warranted nor necessary in this case.

DISCUSSION AND CONCLUSIONS

The Board's decision of January 27, 2012, adopting an expedited procedural schedule in this proceeding, was issued pursuant to authority delegated to the Director of the Office of Proceedings under 49 C.F.R. § 1011.6(c). EARY now appeals that decision pursuant to 49 C.F.R. § 1011.6(b). Under that section, the Board reserves for itself the consideration and disposition of all appeals of decisions issued pursuant to its delegated authority. Such appeals "are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 C.F.R. § 1011.6(b).

EARY argues that the procedural schedule in this case eliminated its right to discovery, and that, if permitted, it would seek the Utilities Board's construction plans, safety measures, technical specifications, schedule, the engineering requirements of the pipeline, and whether the Utilities Board has the benefit of sovereign immunity.⁴ The Utilities Board provides much information of the type requested by EARY in its filings, and thus counters that discovery is neither warranted nor necessary in this case. In both its reply to EARY's appeal and its letter dated February 7, 2012, the Utilities Board represents that, as it has previously stated to EARY,

⁴ Appeal at 6.

it is “willing to (1) follow AREMA construction specifications; (2) follow reasonable safety precautions of EARY; and (3) cooperate with EARY on a schedule of work.”⁵

EARY has failed to demonstrate that the January 2012 decision involved a clear error of judgment or that granting the appeal is necessary to prevent a manifest injustice. Depending on the legal nature of the proceeding, discovery is not always necessary in declaratory order proceedings. Here, the Utilities Board has provided specific information regarding construction plans and specifications of the type that EARY states it would request through discovery,⁶ in addition to making the representations above. EARY has not shown that any further discovery is necessary. Moreover, EARY has not shown that discovery of the other information which it seeks, such as scheduling or the Utilities Board’s status as to sovereign immunity, is necessary. Finally, the expedited procedural schedule in this case was adopted because the Board found merit in the Utilities Board’s claim that a new manufacturing facility has requested sewer service by April 1, 2012. Although EARY questions that claim,⁷ it has failed to provide any specific evidence to the contrary.

For these reasons, we find that EARY has failed to show that the prior decision involved a clear error or that it will cause manifest injustice. As such, we will deny EARY’s appeal.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. EARY’s appeal is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

⁵ Utils. Bd. Letter at 3; see also Reply Statement & Reply to Appeal at 28.

⁶ See, e.g., Reply Statement & Reply to Appeal at 5, 9-10; Reply to Pet. for Declaratory Order at 2-3, 6.

⁷ Appeal at 3-4.